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No. 79-678

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

SAN DIEGO GAS AND ELECTRIC COMPANY,

Appellant,

vs.

CITY OF SAN DIEGO, et al.,

Appellees.

On Appeal From The
California Court of Appeal,
Fourth Appellate District,
Division One

BRIEF AMICUS CURIAE OF THE COUNTY OF LOS ANGELES IN SUPPORT OF APPELLEE, CITY OF SAN DIEGO

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TOPICAL INDEX

		Page
Table of Authorities		iii
I	INTEREST OF AMICUS	1
II	STATEMENT OF THE CASE	8
III	SUMMARY OF THE ARGUMENT	9
IV	THE ARGUMENT	11
	1. The Planning Activities.	11
	2. The Failure Of the Voters to Ratify the Issue Of Bonds to Finance Acquisition Of the Subject Property.	13
	3. The Failure Of the Complaint to Allege and the Trial Court to Find, That the Owner Had Sought Development Permits, Variance, Or Change Of Zone, Is Fatally Defective to a Finding Of a Taking Without Compensation.	13
	4. The Fourteenth Amendment Only Requires That Rights Under the Federal Constitution Be Adequately Protected By State Statutory Or Case Law.	18

5. California Equitable Relief Is Adequate to Protect Fifth Amendment Rights Under the Fourteenth Amendment. 21

6. Inverse Condemnation Damages Would Be a Harsh and Unfair Remedy. 24

7. No Vested Property Right In Existing Zoning. 25

V CONCLUSION 26

TABLE OF AUTHORITIES

Cases	Page
Agins v. Tiburon, 24 Cal.3d 266, 157 Cal.Rptr. 372 (1979), affd. ___ U.S. ___, 65 L.Ed.2d 106 (1980)	2, 7, 9, 14, 18, 19, 20, 21, 26
American Railway Express v. Kentucky, 273 U.S. 269 (1927)	19
Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785, 132 Cal.Rptr. 386 (1976) (Cert. den. 429 U.S. 1083, 51 L.Ed.2d 529)	25
Chicago, B. and Q. Ry. Co. v. Chicago, 166 U.S. 226 (1897)	18
Dalton v. Honolulu, 462 P.2d 199 (Hawaii, 1969)	12
Davis v. Pima County, 590 P.2d 549 (Arizona App. 1978)	24
Eldridge v. Palo Alto, 57 Cal.App.3d 613, 129 Cal.Rptr. 575 (1976)	20, 21
Floresta, Inc. v. San Leandro, 190 Cal.App.2d 599, 12 Cal.Rptr. 182 (1961)	22

Gibbs v. Zimmerman,
290 U.S. 326 (1933) 19

Hardware Dealers Mutual Fire Ins. Co.
v. Glidden Co.,
284 U.S. 151 (1931) 19

H.F.H., Ltd. v. Superior Court,
15 Cal.3d 508,
125 Cal.Rptr. 365 (1975) 20, 21

Igna v. City of Baldwin Park,
9 Cal.App.3d 909,
88 Cal.Rptr. 581 (1970) 23

Iowa Central Ry. Co. v.
State of Iowa,
160 U.S. 389 (1896) 19

MacLeod v. Los Altos,
182 Cal.App.2d 364,
6 Cal.Rptr. 326 (1960) 21, 23

McCaslin v. Monterey Park,
163 Cal.App.2d 339,
329 Pac.2d 522 (1958) 23

Mountain Medical, Inc. v.
Colorado Springs,
608 P.2d 821 (Colorado App. 1979) 24

Nectow v. City of Cambridge,
277 U.S. 183 (1927) 14, 20

New York Times Co. v. Sullivan,
376 U.S. 254 (1963) 18

Oshkosh Waterworks Co. v. Oshkosh,
187 U.S. 437 (1902) 19

Penn. Central Transp. Co. v.
New York City,
438 U.S. 104 (1978) 25

Reynolds v. Barrett,
12Cal.2d 244,
83 Pac.2d 29 (1938) 22

Roman Catholic Welfare Corp.
v. Piedmont,
45 Cal.2d 325,
289 Pac.2d 438 (1955) 22

Selby Realty Co. v. City of
San Buenaventura,
10 Cal.3d 110,
109 Cal.Rptr. 799 (1973) 12, 23

Skalko v. City of Sunnyvale,
14 Cal.2d 213,
93 Pac.2d 93 (1939) 22

Trans-Oceanic Oil Corp. v.
Santa Barbara,
85 Cal.App.2d 776,
194 Pac.2d 148 (1948) 25

Village of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 12

Constitutions

United States Constitution:

Fifth Amendment	8, 18, 19, 21, 25, 26
Fourteenth Amendment	8, 9, 18, 19, 21, 26

Statutes

Supreme Court Rules, rule 36(4)	1
West's California Code of Civil Procedure:	
Section 1062a	22
Sections 1084 to 1094.5, 1107-08	22
Sections 1088, 1107	22
Section 1094.5	23
West's California Government Code:	
Sections 65100, 65101, 65560, 65561, 65562, 65566, 65567 (and Supp. 1980)	2
Sections 65300, 65302, subd. a (and Supp. 1980)	11

West's California Government Code:

Sections 65700, 65803
(and Supp. 1980) 11, 16

Textbooks and Articles

Hagman, Urban Planning and Land Development Control Law (1971)
pp. 53-54 12

Hale, Eldridge v. City of Palo Alto; Aberration or New Direction in Land Use Law?,
Hastings L.J. 1569,
1584-91 (1977) 21

Wright and Webber, Land and Use in a Nutshell (1978),
p. 50 12

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I

INTEREST OF AMICUS

Pursuant to Supreme Court Rules, Rule 36(4), the Los Angeles County Counsel submits this brief in support of the appellee, the City of San Diego.

The County of Los Angeles is the largest local governmental entity in California. The County is charged with land-use planning and zoning responsibility for an immense and varied area in which inadequate land-use planning could prove disastrous to persons and property. The area, approximately 4,000 square miles, is twice the size of Israel and contains nearly as many people as the state of New Jersey.

The County of Los Angeles is presently engaged in the immense, legislatively-mandated project of drafting a general plan. This plan is required by law to include an open-space-land element; zoning ordinances and other land-use control activities must conform with the open-space element of the general plan. See West's California Government Code, Sections 65100, 65101, 65560, 65561, 65562, 65566, 65567 (and Supp. 1980).

The exposure of County economic resources to judgments for compensatory damages under a theory of inverse condemnation for the taking of private property by zoning activities creates an intolerable situation.

Los Angeles County planners and the local elected officials, the Board of Supervisors, believe that the rights of property owners are adequately safeguarded by the equitable remedies described in Agins v. Tiburon, 24 Cal.3d 266, 273, 157 Cal.Rptr. 372, 375 (1979), affd. ___ U.S. ___, 65 L.Ed.2d 106 (1980).

The County of Los Angeles is a glaring and painful example of why local land-use planners

and regulators should not be restrained and intimidated by the threat of judgments for compensatory damages under a theory of inverse condemnation.

Every Winter our remote, coastal areas suffer severe tidal erosion, damaging streets and homes.

Every Spring there are floods, flash floods, and slides of earth and mud, destroying lives and improvements, public and private.

Every Fall our dramatic canyon and foothill fires amaze the nation on T.V. while destroying homes, wildlife, people, and ground cover, setting the stage for the Spring slides, and fouling the already questionable air supply.

The immediate human suffering and the destruction of expensive public and private improvements are not the only social evils caused by the fact that in the past development was allowed where it should clearly not have been.

The amount of public money, federal, state, and local, spent because of these annual disasters since 1950 to protect and assist the very small percentage of the County population which lives in these unstable areas is a scandal, if the relatively small number of people benefited by the public expenditures is considered.

This annual public expense which could be spent to benefit the vast majority of County citizens who live in the stable, more-developed areas of

the County, is a direct result of the laissez-faire attitude which dominated our land-use planning from at least the end of World War II to about the late-Sixties, early-Seventies.

This is to point out that land-use planning and regulation are serious social business. Timid or overly-permissive land-use planners risk the lives, the property, the general health, and the dwindling economic resources of the people.

Land-use planning/regulation is not a game devised by "trendy" beaurocrats and public officials to torment land developers.

Every year in Los Angeles County people die, homes and improvements are destroyed, and vast amounts of public money are spent ineffectively because development was allowed where it should not have been at all or because too-intense development was allowed in light of well-known hazards.

There are, of course, many, more, less dramatic social problems which flow from unwise development of land.

It is believed by many in Los Angeles County that, in the past, land-use planning and regulation officials have been too permissive toward large land developers.

It is also believed that the primary goal of most developers of large tracts of raw land is not to develop their land so that the interests of society are best served but to develop land so that the return on their investments will be maximized or that

their own interests will be best served. This is their right under our system and the Constitution.

But, anyone who believes that "market forces" should be the primary form of regulation of urbanization and land development should closely examine the present condition of Southern California, which until very recently was the most famous example in the Nation of that type of land-use regulation and planning.

As far as urbanization and development of Southern California is concerned, Adam Smith's "invisible hand," working through "market forces," has been "all-thumbs."

The pressure which a large land owner/ developer can bring on local planning officials, especially of small cities or underpopulated counties, is immense, even without the threat of damages in inverse condemnation.

Should small, residential cities and underpopulated counties have to pay huge, artificial and unjust damage awards, in inverse condemnation, without even getting title to the land, as the price of trying to prevent unreasonable or hazardous development of land within their jurisdiction? Equity seems to be the better solution.

Equitable relief is a fair and adequate remedy when regulation of land use constitutes a taking without compensation under the California and federal constitutions. It is fair to the developer and fair to the citizens of the local entity.

Equitable actions are by far the means of resolving such disputes most favored by tradition.

Damages on a theory of inverse condemnation are a harsh, unreasonable, and unfair remedy.

Such damages are a severe penalty against the City or County for trying only to reasonably regulate development within its jurisdiction.

Such damages create a windfall for the property owner who retains title to the land and who then may wait for the environmental, economic, social, or political situation to change and then reapply for the same or modified development permissions or changes of use-regulation. While awaiting a more favorable climate for use of the land he holds it for speculation. Or, he may sell the unburdened fee to someone else to hold for speculation in the always reasonable expectation that change is likely and with the knowledge that pendulums always swing in two directions.

Under the Bill of Rights, the trial and appellate judges hearing these disputes must vigorously protect the rights of the individual property owner from the attempted use of the police power, to regulate land-use, as a substitute for the power of eminent domain and the payment of just compensation.

However, it is intolerable, under the separation-of-powers doctrine, that any judge should rule that there has been a taking without compensation by zoning or planning when the property owner (as in the case at bar) has not even formally

brought the problem to the attention of the local executive and legislative officials by asking for a development permit, a change of zone, or a variance. J.A. 66, 114.

This Court should not find that there has been a taking in the case at bar because this property owner contemptuously refused to ask for development permits, variance, or change of zone, and the trial court violated the separation-of-powers doctrine in finding a taking by zoning or planning in such a case.

Compensatory damages under a theory of inverse condemnation should not be allowed for land-use planning or regulation because the threat of such judgments will intimidate economically hard-pressed local governments and make officials reluctant to prohibit or restrict development of land.

This Court should not find a taking in the case at bar and should uphold the California rule stated in Agins v. Tiburon, 24 Cal. 3d 266, 273, 157 Cal. Rptr. 372, 375, affd. ___ U.S. ___, 65 L. Ed. 2d 106 (1980), that only traditional equitable relief is available when a land owner alleges uncompensated taking or damaging by land-use regulation or planning.

The basic question in this appeal is: who ultimately makes the hard decisions about urbanization and development; the land developers, "market forces," or local elected officials?

If the power of land-use regulation and planning truly resides with local elected officials, applying various enactments of the legislators, with clarification and guidance by the trial and appellate judges, then there is simply no need for damages in these cases. Equitable relief, the only remedy ever recognized by this Court in such cases, is enough to satisfy the Fifth and Fourteenth Amendments.

II

STATEMENT OF THE CASE

Attorneys for Amicus, County of Los Angeles, want to specially emphasize the following facts of this case:

1.) The appellant, property owner, has not made an application to use or to improve the subject property nor has it asked the city what development would be permitted. J.A. 66, 114.

2.) Property owner does not allege that it has requested a variance or change of zone, nor does the record reflect that this is the case. J.A. 4-34.

3.) The subject judgment in inverse condemnation, based on a theory of a taking, does not pass title to the fee of the subject property or to any described easement in the subject property to the City of San Diego on payment of the award. J.A. 44-47.

III

SUMMARY OF THE ARGUMENT

No case of this Court or of California or of any other jurisdiction has held that mere planning activities of local government for land use, as opposed to zoning activities, may constitute a taking without compensation.

No case has ever held that rejection of a bond issue to acquire property for public purpose, by the voters, for open space, may constitute a taking without compensation.

Since harsh or unreasonable or discriminatory classification of a parcel in a zoning ordinance may be a ground for variance or change of zone, there should be no finding of taking without compensation by zoning ordinance unless the property owner has sought relief from the zoning classification of his property through the zoning process.

The Fourteenth Amendment does not require that all states provide the same means of protecting the federally guaranteed constitutional rights of citizens. The amendment requires only that the judicial and legislative acts of each state adequately protect and vindicate constitutional rights of citizens.

Under the law of California, equitable relief, as described by the California Supreme Court in its Agins decision, is adequate protection of the federal constitutional right to be free from

unconstitutional zoning acts of local governments. If a zoning ordinance would work a taking without compensation as to a parcel of land, the ordinance must be declared void as to the property or a variance or change of zone, if denied by the zoning authority, must be mandated by the trial judge.

Equitable relief is the traditional method for landowners to protect themselves from abuse of the police power to regulate land by zoning.

Equitable relief will not be an adequate judicial remedy unless the property owner is required, before he can allege an uncompensated taking, to first seek development permission, variance, or change of zone, for a specific development project, because the equity power balances rights, hardship, and interests, and unless a specific development plan has been proposed by the owner and rejected by the zoning entity, there is nothing to be balanced against, say, the property interests of complaining neighbors.

Compensatory damages under a theory of inverse condemnation are a harsh, unreasonable, and unfair remedy from the standpoint of the citizens of a defendant, local governmental entity.

There is no vested property right in existing zoning of a parcel.

IV

THE ARGUMENT

1. The Planning Activities.

In this case three basic activities of the City are alleged to give rise to a taking without compensation: the designation of some of the subject property as open space on the general plan of the City; unsuccessful attempts to have the open-space bond issue, which could have led to acquisition of part of the subject by eminent domain, ratified by the voters; down zoning of a portion of the subject property from M-1-A to A-1-10. J.A. 36-42.

It is obvious from the findings of the trial judge that he attributed the greatest weight to the designation of some of the property as open space on the City's general plan. J.A. 41.

All local governmental entities in California must enact open-space plans. West's California Government Code §65300, 65302, subd. a (and Supp. 1980).

The City of San Diego as a charter city is not required by statute to render its zoning ordinances consistent with its open-space plan, nor to allow only development consistent with its open-space plan. West's California Government Code, §§65700, 65803 (and Supp. 1980).

In any event, no application for clarification of the plan, variance or change of zone, or permission to develop was ever submitted by the owner.

Planning is not the same as zoning. Zoning, rather than planning, controls the use of a parcel of land. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); see also Hagman, Urban Planning and Land Development Control Law (1971) pp. 53-54.

In general, zoning should be consistent with a plan and the plan should not be amended constantly to allow zoning changes. Dalton v. Honolulu, 462 P.2d 199, 205-09 (Hawaii, 1969).

The plan is analogous to a constitution as the zoning ordinance is analogous to a statute. See Wright and Webber, Land Use in a Nutshell (1978), p. 50.

No known case has held that planning per se, as opposed to the actual zoning regulation, which may be based on a plan, may constitute an uncompensated taking of property for public use.

Because to allow inverse condemnation damages for planning could have a negative effect on the planning process, which is generally considered to be socially beneficial, the California Supreme Court has ruled that mere planning may not constitute a taking. Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110, 120-21, 128, 109 Cal.Rptr. 799, 805-06, 810 (1973).

2. The Failure Of the Voters to Ratify the Issue Of Bonds to Finance Acquisition Of the Subject Property.

No known case has ever held that a failed attempt at a bond issue to acquire a parcel can amount to a taking of that parcel.

It is hard to see how any damage could flow from such an election because the results rejecting acquisition would be well-publicized.

3. The Failure Of the Complaint to Allege and the Trial Court to Find, That the Owner Had Sought Development Permits, Variance, Or Change Of Zone, Is Fatally Defective to a Finding Of a Taking Without Compensation.

It is admitted that the property owner herein failed to do any of the following things:

1.) It did not seek clarification from the planning and zoning entity of what type of development would be allowed on the subject property. J.A. 66.

2.) It did not seek permission to grade, to build, or to develop the property in any way. J.A. 66, 114.

3.) It did not seek a variance or a change of zone. J.A. 4-34.

This Court has very recently spoken on this issue in Agins v. Tiburon, ___ U.S. ___, 65 L.Ed. 2d 106, 112 (1980), when it said:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . , or denies an owner economically viable use of his land. . . . Id., 65 L. Ed.2d at 112 (citations omitted, emphasis added).

In Agins this Court ruled that planning and zoning for the preservation of open space substantially advances a legitimate state interest. Agins v. Tiburon, supra, 65 L.Ed.2d at 112. So, the questions are whether the ordinance has been applied and, if so, whether the owner has been denied economically viable use of his land.

This Court has generally required that a specific proposal for development or use of the owner be considered by the entity. See e.g., Nectow v. City of Cambridge, 277 U.S. 183, 186 (1927) (application for permit to build contrary to the zoning).

It is very difficult to determine whether the owner has been denied economically viable use of this land when no proposed development has been put forward by the owner and rejected by the City, either by denial of permits to build or by rejection

of a request for variance or change of zone.

If an ordinance seems harsh toward the owner on its face, but if a variance or change of zone is "his for asking," surely there could be no taking.

It is very difficult in this case to believe the owner has lost all use because the City seems to be saying in the ordinances that the highest and best use, an industrial park with buffer areas, would be allowed. J.A. 38-41.

In the case at bar, the zoning ordinance in question, mostly industrial with some agricultural, has clearly not been applied to the subject property because the owner has not sought a permit to build an industrial park on its M-1-A land, which the trial court found as the parcel's highest and best use. See J.A. 39, 40, and 41.

The agricultural zonings, A-1-10 and A-1-1, have not been applied to the subject parcel because the owner has not requested a variance or a change of zone based on "submittion of a specific plan of development." J.A. 39-41.

Apparently the city planners have indicated that a substantial portion of the agriculturally zoned part of the parcel could be used for industrial development on the submission of a specific plan for development. J.A. 39, 40.

The trial court obviously believed that the designation of some of the property as open space, on the general plan, would control over the actual

zonings of M-1-A and A-1-1 (with possible use as industrial on submission of a specific plan for development) of the zoning ordinance.

The Trial Court deemed that, in spite of the state statute which excused charter cities, like San Diego, from the requirement of consistency between general plan and zoning ordinance (West's California Government Code, §§65700, 65803 (Supp. 1980)), the open-space designation on the general plan was, in effect, a zoning ordinance.

However, even viewed as a zoning ordinance the open-space designation has not been applied to the subject property until a variance or change request by the owner has been denied, or until a specific plan for development has been disapproved on the grounds that it is not allowed under the open-space designation.

The City, even if it wanted to, has been given no legal opportunity to resolve this alleged harsh and unreasonable zoning of the subject property because no specific plan for development has been proposed for which a variance or change of zone could be granted.

Because the interests of the public, especially neighbors, must be given great weight by the entity in any zoning case, the request to develop or for a change of zone or variance must come from the owner. Otherwise, why should the city risk injuring neighbors by granting a variance which the owner doesn't want?

And, again, in the case at bar, the city maintains that it would honor the present industrial and agricultural (with possible change to industrial for a specific plan) zoning, if development were sought.

To a large county such as Los Angeles this prerequisite that a zoning ordinance be applied to property before a taking can be found is very important because, until there is a specific request for variance or change of zone, based on a specific project or a request for a permit to develop, the county planners might not even be aware of the problem.

Some zones might be hundreds of miles in area.

Furthermore, due process requires that all changes of zone or variance be granted only after noticed hearing which are frequently attended by concerned neighbors. Unless a specific plan of development is proposed by the owner the zoning authority is being asked to make a decision with insufficient data.

This ordinance and this open-space plan have not been applied to this property. This trial judge was acting contrary to the separation-of-powers doctrine in finding a taking without compensation. He denied local legislative and executive officials their right to correct any alleged unfairness to the owner.

4. The Fourteenth Amendment Only Requires That Rights Under the Federal Constitution Be Adequately Protected By State Statutory Or Case Law.

This Court expressly refrained from passing, at the end of its Agins opinion, on whether the states may limit persons, whose land has been taken without just compensation by land-use regulation to equitable relief. Agins v. Tiburon, supra, 65 L.Ed. 2d at 114.

The equitable remedies allowed under California law are described in Agins v. Tiburon, 24 Cal.3d 266, 273, 157 Cal.Rptr. 372, 375 (1979) (hereafter "California Agins").

The acts and decisions of the California Supreme Court are "state action" and the taking clause of Fifth Amendment applies to the states through the due process clause of the Fourteenth Amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1963); Chicago, B. and Q. Ry. Co. v. Chicago, 166 U.S. 226, 234-41 (1897).

The settled rule in Fourteenth Amendment questions is that state judicial action need not provide specific legal means of vindicating constitutional rights as long as the remedy provided is adequate. A state's judiciary may even substantially change the means of vindicating the rights as long as an adequate remedy is substituted.

A state is not required by the Fourteenth Amendment to permit a damage action, or any specific form of action for the vindication of constitutionally protected rights as long as the available remedy is adequate to protect rights guaranteed by the Constitution. Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933); Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 159-60 (1931); Iowa Central Ry. Co. v. State of Iowa, 160 U.S. 389, 393 (1896); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1902).

This principle applies to the appellate courts of a state as well as to the state legislature. American Railway Express v. Kentucky, 273 U.S. 269, 274 (1927).

The federal constitutional question under the Fourteenth Amendment is whether the state remedy desribed in California Agins is adequate to vindicate and protect property rights under the taking clause.

If California equitable relief is adequate to protect land owners' rights under the taking clause of the Fifth Amendment then the California Supreme Court should be affirmed on this point.

This Court has never held that compensatory damages under a theory of inverse condemnation must be allowed by state law under the Fourteenth Amendment when land-use regulation constitutes an uncompensated taking for a public purpose.

The leading cases of this Court on taking by land-use regulation involve equitable relief rather

than money damages under a theory of inverse condemnation. See e.g., Nectow v. City of Cambridge, 277 U.S. 183 (1927).

It is important to remember that no remedy was taken away from property owners by the California Agins decision. The decision only affirmed the status quo of no inverse damages for zoning.

The California Supreme Court has never held that zoning activities, which constitute a taking of property without just compensation, give rise to a cause of action for money damages under a theory of inverse condemnation. In H.F.H., Ltd. v. Superior Court, 15 Cal.3d 508, 518 note 16, 125 Cal.Rptr. 365 (1975), the court expressly refused to rule on the question.

California courts have never allowed money damages on an inverse condemnation theory in a true zoning case except for Eldridge v. Palo Alto, 57 Cal. App.3d 613, 129 Cal.Rptr. 575 (1976), an intermediate-level appellate decision, which was expressly overruled on this point by the California Supreme Court in Agins v. Tiburon, supra, 23 Cal.3d 266, 273.

All earlier zoning/taking cases, in which damages for inverse condemnation were allowed involved factual situations distinctly different and easily distinguishable from the facts pleaded in Eldridge or Agins. See extensive analysis of all early zoning/taking/inverse cases in California, H.F.H., Ltd. v. Superior Court, supra, 15 Cal.3d at 513-18 and notes 4 through 14.

It can be strongly argued that Eldridge is based on serious misinterpretation of the very cases discussed by the H.F.H., Ltd. court. See Hall, Eldridge v. City of Palo Alto; Aberration or New Direction in Land Use Law?, 28 Hastings L.J. 1569, 1584-91 (1977).

5. California Equitable Relief Is Adequate to Protect Fifth Amendment Rights Under the Fourteenth Amendment.

The California Supreme Court in California Agins has not limited the right of land owners to be free from uncompensated takings.

The California Court has merely said that if a local zoning ordinance would constitute a non-compensated taking, under the applicable tests, it is void: the property owner's property rights are vindicated by a declaration of voidness and/or by mandate. Agins v. Tiburon, supra, 23 Cal. 3d at 273; see also MacLeod v. Los Altos, 182 Cal. App. 2d 364, 369-70, 6 Cal. Rptr. 328 (1960).

Obviously, the greatest protection of rights available to the property owner, which is described in Agins, is that a zoning ordinance which violates the taking clause is subject to invalidation. No valid zoning ordinance can also be an uncompensated taking. Eldridge v. Palo Alto, 57 Cal. App. 3d 613, 621, 129 Cal. Rptr. 575 (1976), which held otherwise was expressly overruled in Agins. Agins v. Tiburon, supra, 23 Cal. 3d 273.

In practical terms, the equitable enforcement and protection of the constitutional right to be free of zoning which violates the taking clause is an effective remedy under our state law and procedure for the following reasons:

1. Priority of Trial Setting and Speedy Resolution: The action for declaratory relief is specifically entitled to priority in setting for trial. West's California Code of Civil Procedure, §1062a. Mandamus, either administrative or traditional, West's California Code of Civil Procedure, §§1084 to 1094.5, 1107-08, is a special proceeding and trial may be had and the writ issued or denied very quickly. The alternative writ, which must issue within five days, includes the date for the hearing on the merits. West's California Code of Civil Procedure, §§1088, 1107.

2. The action for declaratory relief is well-established in California as a means to void a zoning ordinance which is unconstitutional or unconstitutional as applied. Skalko v. City of Sunnyvale, 14 Cal.2d 213, 216, 93 Pac.2d 93 (1939).

3. The traditional writ of mandate is long-established in California as a means of challenging unconstitutional zoning and zoning actions. Roman Catholic Welfare Corp. v. Piedmont, 45 Cal. 2d 325, 334, 289 Pac.2d 438 (1955); Reynolds v. Barrett, 12 Cal.2d 244, 249-52, 83 Pac.2d 29 (1938); Floresta, Inc. v. San Leandro, 190 Cal. App.2d 599, 612, 12 Cal.Rptr. 182 (1961).

4. Administrative mandate is also an effective remedy. If the challenged ordinance

provides for administrative hearing and appeals, as most do, then traditional or ordinary mandamus is not the proper remedy; rather, the proper remedy is administrative mandate. West's California Code of Civil Procedure, §1094.5; see also Selby v. San Buenaventura, 10 Cal.3d 110, 128, 109 Cal.Rptr. 799 (1973).

5. The enforcement of an unconstitutional zoning ordinance may be enjoined. MacLeod v. Los Altos, 182 Cal.App.2d 364, 369-70, 6 Cal.Rptr. 326 (1960); McCaslin v. Monterey Park, 163 Cal. App.2d 339, 346-48, 329 Pac.2d 522 (1958).

Under California law a landowner who challenges zoning must pursue administrative remedies before seeking judicial relief. Failure to so plead is grounds for a general demurrer. Igna v. City of Baldwin Park, 9 Cal.App.3d 909, 914, 88 Cal.Rptr. 581 (1970).

This is clearly a good rule for purposes of judicial economy, especially when the relief sought is equitable.

The failure of the trial court to find that the property owner has done this (J.A. 35-42) violates the above rule and the doctrine of separation of powers. This omission of both the complaint and the findings is an adequate reason for this Court to find that there had been no sufficient allegation or proof of a taking herein.

6. Inverse Condemnation Damages Would Be a Harsh and Unfair Remedy.

Appellant's position would require the local governmental entity to pay severe damages for merely enacting in good faith a general plan, or zoning ordinance, which the property owner need not even seek to have clarified or modified.

The entity in the case at bar after paying compensation does not even have a recordable judgment giving it an interest in the land, neither a fee, nor a described easement, nor even a recordable metes-and-bounds description of the land actually taken. J.A. 44-47.

California is not alone among the states in holding that the owner's remedy, if zoning or other legislative action would constitute a taking of property, is equitable relief rather than damages under an inverse theory. See Davis v. Pima County, 590 P.2d 549, 461 (Arizona App. 1978); Mountain Medical, Inc. v. Colorado Springs, 608 P.2d 821, 823-24 (Colorado App. 1979).

The equitable remedy would seem to be far less drastic and also protective of the land owner's rights. There is no indication in California case law that equitable relief is inadequate to protect property rights.

7. No Vested Property Right In Existing Zoning.

The fact that the owner herein failed to seek permission to develop the property as an industrial park with variances or changes or zone, as necessary, is convincing evidence that what it has suffered is not a taking but a mere decline in market value based on uncertainty as to possible use. It is not even clear from the record that this "down zoning" of the land has actually occurred.

It is well-established in American property law that a landowner has no vested right in existing zoning of a parcel until he obtains a building permit and substantially starts construction. Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785, 791, 132 Cal.Rptr. 386 (1976) (Cert. den. 429 U.S. 1083, 51 L.Ed.2d 529); Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 782-98, 194 Pac.2d 148 (1948).

Substantial diminution of value caused by down-zoning is not a taking under the Fifth Amendment. Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 131 (1978).

Until the property right to zoning has vested in the owner, there is no "property" in the zoning to "take."

It is very difficult to fairly determine if the owner herein has really been denied "economically viable use of his land" when no proposed use

whatever has been put forward or denied because of land-use regulation. Agins v. Tiburon, supra, 65 L.Ed.2d at 112.

All that has really happened to this owner is that the market value of his property may have temporarily declined because of land-use uncertainty which he has done nothing whatever to clarify or resolve.

V

CONCLUSION

This Court is requested to affirm the decision of the California Court of Appeals or, in the alternative, to find that it does not have jurisdiction, because California equitable relief is adequate under the Fourteenth Amendment to protect the Fifth Amendment rights of property owners.

Respectfully submitted,

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